FILE COPY

IN THE

Supreme Court of the United States

October Term, 1946.

No. 411

THE PEOPLE OF THE STATE OF NEW YORK,
on Complaint of MICHAEL FITZGERALD,
Respondent,

AGAINST

HAROLD HERMAN,
Petitioner.

Petition for Writ of Certiorari to the Appellate Division, First Judicial Department, of the Supreme Court of the State of New York.

Sol. A. Herzog,
Attorney for Petitioner.

Lodge Appeal Press, Inc., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

SUBJECT INDEX.

CONSTITUTIONAL PROVISION.

ORDINANCES AND STATUTES.

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Petition for Writ of Certiorari to the Appellate Division, First Judicial Department, of the Supreme Court of the State of New York.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, a resident of the State of New York and a citizen of the United States, respectfully prays that a writ of certiorari issue to review the final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, the court of last resort in the State of New York having jurisdiction hereof, which order was entered on April 18th, 1946 (R. 83) and affirmed a judgment of conviction of the Court of Special Sessions of the City of New York dated April 4th, 1944 (R. 7).

Application under permissive provisions of the Civil Practice Act of the State of New York to the Appellate Division, First Judicial Department, for leave to appeal to the Court of Appeals of the State of New York (R. 84 ff.) was denied by that Court on June 28th, 1946 (R. 95-6). A further application under similar statutory provisions to a judge of the Court of Appeals was denied on July 14th, 1946 (R. 97-8).

Opinions Below.

No opinion was rendered by any of the courts of the State of New York. The trial court wrote no opinion (R. 80).

The affirmance of the judgment of conviction by the Appellate Division, First Judicial Department, was without opinion (R. 83) and is reported in 270 App. Div. 891. The order of the Appellate Division, First Judicial Department, denying leave to appeal, was without opinion (R. 95) and is not yet officially reported, and appears in New York Law Journal for June 29, 1946.

The order of Judge Stanley H. Fuld of the Court of Appeals of the State of New York, denying leave to appeal, was also without opinion, and is not reported.

Jurisdiction.

The order of the Appellate Division, First Judicial Department, affirming the judgment of conviction below, was entered on April 18th, 1946 (R. 83). That Court is the highest court within the State of New York to which a defendant, convicted in the Court of Special Sessions of the City of New York, may appeal as of right (Code of Criminal Procedure of the State of New York, Section 520).

The applications filed thereafter to the Appellate Division, First Judicial Department, for leave to appeal (R.

84 ff.) and to Judge Fuld of the Court of Appeals, both of which applications were denied (R. 95-8), were based upon statutory provisions permitting allowance of appeal but not granting appeal as of course (idem).

The time for filing a petition for writ of certiorari to this Court was extended to August 20th, 1946 by order dated July 13th, 1946 (R. 99).

The jurisdiction of this Court is invoked under Section 237(a) of the Judicial Code (28 U. S. C., §344).

Questions Presented.

1. Whether the construction by the Courts of the State of New York of the provisions of the Sanitary Code of the City of New York, and companion ordinances and statutes (*infra*, pages 10-12), whereby liability absolute, regardless of any other circumstance or fact, is imposed upon an owner of residential property to supply and maintain heat of not less than a specified minimum temperature, resulting in a conviction and jail sentence, or in the alternative a fine, does not deprive such property owner of life, liberty or property, without due process of law, as guaranteed by the Fourteenth Amendment.

2. Whether a judgment of conviction of an owner of residential property, for violation of the Sanitary Code of the City of New York and companion ordinances and statutes (*infra*, pages 10-12), in failing to supply and maintain heat of not less than a specified minimum temperature, in the absence of any evidence whatsoever of wilfulness or intent, as required by the statutes of the State of New York, does not deprive such property owner of life, liberty or property, without due process of law, as guaranteed by the Fourteenth Amendment.

Constitutional and Statutory Provisions Involved.

The relevant portions of the Constitution are set forth in the appendix, *infra*, page 13. The relevant portions of the Sanitary Code of the City of New York, of the Charter of the City of New York, of the Administrative Code of the City of New York, and of the Penal Law of the State of New York, are set forth in the appendix, *infra*, pages 10-13.

Statement.

Petitioner herein was convicted after trial without a jury, on April 4th, 1944, in the Court of Special Sessions of the City of New York (R. 6) on an information charging him with violation of Section 225 of the Sanitary Code of the City of New York (R. 4-5). He was fined $150, or, in default of payment, sentenced to imprisonment in City Prison for not to exceed sixty days (R. 7). The fine was paid (R. 7).

On appeal to the Appellate Division, First Judicial Department, that judgment of conviction was affirmed (R. 83). This exhausted petitioner's right of appeal and permission for further appeal was denied (R. 95-8).

As no opinion was written at any stage of the proceedings below, the precise grounds upon which the conviction was based and affirmed cannot be definitely stated. However, the Trial Justice of the Court of Special Sessions did make a statement from the bench that may fairly be taken as the rationale of the judgment of conviction:

> "The Court: So you will understand me, and all the rest. I have just drafted in pencil something here. I am going to make it very short. I shall rule, as a matter of law, that a landlord, during the height of the winter season, cannot resort to a conversion from coal to oil, or vice-versa. In doing

so, it may be evident that tenants may be deprived of heat. To say the least, it is untimely. When he does it, it is at his risk. It will be noted that Section 1740 recites in part ' * * * or omits to comply with any lawful order', and so forth. I deny the motion to dismiss and find the defendant guilty" (R. 76-7).

The consequences in law of this rather startling pronouncement, wholly without statutory basis or judicial buttress, will be discussed at length in the brief filed in support of this petition. The trial record itself is not lengthy and the pertinent portions are here set forth.

The information charged that petitioner, as owner of an apartment building in New York City, " * * * had contracted, undertaken and bound himself to heat and furnish heat for the said dwelling" (R. 84). It charged further that on March 24th, 1944 "and at divers times prior thereto" defendant had failed to heat three specified apartments to a minimum temperature of sixty-five degrees Fahrenheit during certain hours of the day, as required by the Code (*infra*, page 10).

While this is not altogether clear from the record, it would appear that the information, as originally drawn and served, specified only the one date, to-wit, March 24th, 1944, and three specific apartments, to-wit, 6A, 7A and 7B (R. 4). The trial minutes disclose that at the opening, the Corporation Counsel moved "to amend the complaint to read 'divers times prior thereto' " (R. 11). The Court permitted the amendment (idem). Thereupon the Corporation Counsel moved again "to amend the complaint to include * * * any other apartment * * * ", which motion was also granted (R. 11-12, 16).

The Department of Health Inspector testified that he visited the premises involved on March 24th, 1944 (R. 12-15) and that at such times the interior temperature was

less than sixty-five degrees Fahrenheit, the minimum required by the Sanitary Code (*infra*, page 10).

He testified that he had been there also on March 21st, 1944 (R. 16-17), on which date he found the temperature to be above the requirement of sixty-five degrees Fahrenheit (R. 17). This witness was the only one who testified to the use of a thermometer in determining the temperatures (R. 13-14, 22, 28) and he admitted that the thermometer used by him had not been verified nor tested at or near the time of use (R. 18).

Other witnesses for the State testified with varying degrees of vagueness that for short periods of time on one or more days between March 17th, 1944 and March 24th, 1944 their respective apartments had been "cold" (R. 21-2, 28, 31, 33-4, 37, 38, 40). The sole date concerning which there was testimony that there had been no heat for any extended period of time was March 17th, 1944 (R. 34, 37).

Petitioner does not deny that for short intervals on several days between March 17th and March 24th, 1944 there had been some inadequacy of heat. Objection was duly taken to the vague, loose testimony of the State witnesses, based altogether as it was upon admissions by such witnesses that at no time had any of them measured the temperatures with a thermometer (R. 23, 27, 42, 74). Petitioner's defense was that these short intervals of heat inadequacy were due solely and entirely to breakdowns in the heating equipment—a defense totally and altogether uncontradicted by the State, and the factual basis of which was admitted by witnesses for the State.

Thus: Testimony for the defense showed that when this building was first acquired by the defendant in January, 1942, a conversion from coal heating to oil heating was required by the mortgagee (R. 58), that by order of the Petroleum Administration for War, a Federal agency, defendant was compelled to re-convert to coal in March,

1943 (R. 58), and that the use of coal involved such great difficulties and dissatisfaction (R. 56, 58-9, 65-6, 69-71, 72-3, 78), a fact judicially noted by the Trial Court (R. 78), and to such an extent, that defendant had been convicted in December, 1943 on a similar charge, because use of coal made it impossible to supply and maintain adequate heat (R. 78).

Consequently, defendant contracted to re-convert to the use of oil in March, 1944 (R. 43, 48, 59). This task was commenced at 9:30 A. M. on March 17th, 1944 (R. 43, 46-7, 52), the fire being drawn at that time (R. 43-4), and was worked on continuously until completed at 3 A. M. on March 18th, 1944, when the furnace was again started (R. 44, 52, 59). The Board of Health of the City of New York, the City agency which instigated this prosecution, was notified that this work was about to be done (R. 49).

The short intervals of heat inadequacy thereafter were due to temporary breakdowns of the heating equipment, and the utmost dispatch and efficient effort were used to make repairs (R. 44-7, 52-3). Except for these short periods, the heat was always adequate and in compliance with law (R. 54-5) and there was always plenty of oil on hand (R. 46, 59). Instructions to the superintendent were to supply heat at all times (R. 51, 60-1).

Not only is there not the slightest contradiction of this testimony, but witnesses for the State admitted it (R. 17, 19, 24-5). This negates *in toto* any possibility of attributing to defendant either wilfulness or intent, which contention was urged below (R. 42, 76). And during the course of the trial, the court was apparently of the same mind (R. 51).

As will be shown by the discussion in the supporting brief, petitioner's position is that the arbitrary conclusion of the Court below (*supra*, pages 4-5), resulting in his conviction, and the affirmance thereof, in the absence of even the *prima facie* establishment of this *sine qua non*, has de-

prived him of life, liberty or property, without due process of law.

Specification of Errors to Be Urged.

The Courts of the State of New York erred:

1. In failing to hold that, in a criminal prosecution, the guilt of the defendant must be established beyond a reasonable doubt, thus depriving defendant of life, liberty or property, without due process of law.

2. In failing to hold that in a criminal prosecution for violation of the Sanitary Code of the City of New York, and of the statutes implementing it, the prosecution must establish beyond a reasonable doubt, wilfulness or intent on the part of the defendant, thus depriving defendant of life, liberty or property, without due process of law.

3. In holding in effect, by conviction and affirmance, that the mere fact, *per se*, of a failure to supply heat of a temperature up to the Code minimum, in the face of uncontradicted evidence negating wilfulness or intent, is sufficient to sustain a conviction for violation of the Sanitary Code of the City of New York, and of the statutes implementing it, thus depriving defendant of life, liberty or property, without due process of law.

4. In failing to reverse the judgment of conviction.

Reasons for Granting the Writ.

1. The courts of the State of New York have decided Federal questions of substance not theretofore determined by this Court.

This Court has repeatedly scrutinized legislative acts of a state *vis-a-vis* the requirements of the Constitution, and particularly of the Fourteenth Amendment. It has assumed jurisdiction time and again over appeals to it, asserted on the basis of defects in state judicial criminal

proceedings that in their consequences have deprived a defendant of the guarantees of the Fourteenth Amendment.

It is doubtful, however, that this Court has heretofore expressly reviewed the substance of a state court determination that, because of its utter lack of support in the statutes upon which the prosecution was based, does, in effect, violate the guarantees of the Amendment. Here the disregard by the State courts was rampant.

2. This case is one of public interest and importance. Virtually all the states and numerous municipalities have ordinances and statutes the same as, or similar to, those involved here.

To permit the result reached below to stand is to condone judicial legislation in an extreme form. This being a criminal matter, the liberty of the citizen is directly involved.

The statutes of the State of New York, as well as similar enactments of other states, state specifically what shall constitute the elements of the misdemeanor charged against petitioner. The courts below have by-passed those requirements and have pronounced a novel doctrine, obviously designed at the moment for this sole immediate purpose,—to convict this defendant.

A pronouncement by this Court that it, as guardian of the guarantees of the Fourteenth Amendment, will examine into the substance of a state court determination, and, if it finds that such determination does violence to the statutes of the state upon which the state courts acted, will prescribe adherence to those statutes, will serve a salutary and public purpose.

For these reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

Sol. A. Herzog,
Attorney for Petitioner.

August, 1946.

APPENDIX.

Sanitary Code of the City of New York (Pertinent Provisions).

§224. Punishment for violation of the Sanitary Code.

Any violation of the Sanitary Code of the City of New York shall be punished in the manner prescribed by Sections 1740 and 1937 of the Penal Law of the State of New York, Section 558 of the New York City Charter, and Section 564-6.0 of the Administrative Code of the City of New York. (Adopted May 21, 1918, and amended May 10, 1938 and October 7, 1941.)

§225. Heating of Occupied Buildings.

It shall be the duty of every person who shall have contracted or undertaken, or shall be bound, to heat, or to furnish heat for any building or portion thereof, occupied as a home or place of residence of one or more persons, or as a business establishment where one or more persons are employed, to heat, or to furnish heat for every occupied room in such building, or portion thereof, so that a minimum temperature of sixty-eight (68) degrees Fahrenheit may be maintained therein at all such times. Provided, however, that during the present war emergency, it shall not be deemed a violation of this section if a minimum temperature of sixty-five (65) degrees Fahrenheit is maintained at all such times. The provisions of this section shall not apply to buildings, or portions thereof, used and occupied for trades, businesses, or occupations where high or low temperatures are essential and unavoidable.

For the purpose of this section, wherever a building is heated by means of a furnace, boiler, or other apparatus under the control of the owner, agent, or lessee of such

building, such owner, agent, or lessee, in the absence of a contract or agreement to the contrary, shall be deemed to have contracted, undertaken, or bound himself or herself to furnish heat in accordance with the provisions of this section.

The term "at all such times" as used in this section, unless otherwise provided by a contract or agreement, shall include the time between the hours of 6 a. m. and 10 p. m. in a building, or portion thereof, occupied as a home or place of residence, of each day whenever the outer or street temperature shall fall below fifty-five (55) degrees Fahrenheit, and during the usual working hours established and maintained in a building, or portion thereof, occupied as a business establishment, of each day whenever the outer or street temperature shall fall below fifty (50) degrees Fahrenheit.

The term "contract" as used in this section shall be taken to mean and include a written or verbal contract. (As amended September 12, 1944.)

New Charter of the City of New York (Effective Jan. 1, 1938).

§558. a. The sanitary code which is in force in the city on the date at which this charter takes effect and all existing provisions of law fixing penalties for violations of the code and all regulations of the board of health on file with the city clerk on the date when this charter takes effect shall continue to be binding and in force except as amended or repealed from time to time. Such code shall have the force and effect of law.

* * * * *

d. Any violation of the sanitary code shall be treated and punished as a misdemeanor. Pecuniary penalties for violations of the sanitary code may be recovered in a civil action before any justice or tribunal in the city having jurisdiction of civil actions.

Administrative Code of the City of New York (Chapter 929, Laws of 1937).

§564-6.0. Penalties. a. Every person, corporation, or body that may have wilfully done or omitted any act or thing which is by any law declared to be, or to subject the party guilty thereof to punishment for, a misdemeanor, shall in addition thereto, be subject to a penalty of two hundred fifty dollars, to be sued for and recovered by the department in any civil tribunal in the city.

b. Every person, corporation, or body, that shall violate or not conform to any provisions of the sanitary code, or any rule or sanitary regulation duly made, shall be liable to pay a penalty not exceeding fifty dollars nor less than twenty dollars for each offense, which may be sued for and recovered by and in the name of the department, with costs, before any justice or tribunal in the city having jurisdiction of similar actions. The judge or justice who presided at a trial where such penalty is claimed, on such trial, in writing, shall fix the amount of the penalty to be recovered, and shall direct such amount to be, and it shall be included in the judgment.

Penal Law of the State of New York (Pertinent Provisions).

§1740. Wilful violation of health laws.

1. A person who wilfully violates or refuses or omits to comply with any lawful order or regulation prescribed by any local board of health or local health officer, is guilty of a misdemeanor.

2. A person who wilfully violates any provisions of the health laws, or any regulation lawfully made or established by any public officer or board under authority of the health laws the punishment for violating which is not

otherwise prescribed by those laws, or by this chapter, is punished by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars or by both.

Fourteenth Amendment.

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The judgment of the Court of Special Sessions, which rendered the judgment of conviction herein, is unreported. The judgment of affirmance of that conviction by the Supreme Court, Appellate Division, First Judicial Department, is reported in 270 App. Div. 891.

The decision of that same Court, denying leave to appeal, is not yet officially reported and appears in New York Law Journal for June 29, 1946. The order of Judge Stanley H. Fuld of the Court of Appeals of the State of New York, denying the application for leave to appeal to it, is not reported.

No opinions were written by any of the Courts below.

Jurisdiction.

Jurisdiction to entertain this Petition is based upon the Judicial Code, Section 237(a), amended (28 U. S. C. §344).

Questions Presented.

The questions presented are set forth in full in the Petition, page 3, and are herein incorporated by reference.

Statutory and Constitutional Provisions Involved.

The constitutional and statutory provisions involved are set forth at length in the Appendix, pages 12-15.

Statement.

Those portions of the record below that are germane to the issues raised by the Petition are contained in the Statement of the Petition, pages 4-8, to which reference is respectfully made. Hence, that statement of fact is not here repeated. Reference will be made in the Argument hereinbelow presented to that Statement.

Specification of Errors to Be Urged.

The errors to be urged are stated in the Petition, page 8, and are herein incorporated by reference.

Argument.

The sole appeal available to petitioner here, as a matter of right, was to the Appellate Division, First Judicial Department.

> "§520. All appeals, provided for in this chapter may be taken as a matter of right. Every person convicted in a criminal action or proceeding shall have the right to have such judgment of conviction or order reviewed on appeal by an appel-

late tribunal as herein provided, but there shall be only one such appeal and the decision of the appellate court shall be final, and no appeal shall lie from that court to any other court except as hereinafter provided.

1. In the city of New York such appeals shall be taken as follows: * * * from a conviction by a court of special sessions to the appellate division of the supreme court of the department in which the conviction was had; * * *.

* * * * *

3. Where an appeal has been taken and has been decided by any of the appellate tribunals hereinabove referred to, a further right of appeal to the court of appeals shall lie as hereinafter prescribed, but not otherwise. If a judge of the court of appeals or a justice of the appellate division of the supreme court of the department in which such conviction was had certifies that a question of law is involved which ought to be reviewed by the court of appeals, then a further appeal on such question of law may be taken to the court of appeals." (Code of Criminal Procedure, §520.)

The Courts of the State of New York hold that appeal in a criminal case is not a matter of inherent right, but exists only by authorization of statute. *People* v. *Mellon*, 261 App. Div. 400, at 401. The fact that in the case at bar petitioner addressed his application in the Appellate Division for leave to appeal, to the Court as such, rather than to one of the justices thereof, constituted no bar to the subsequent application to a judge of the Court of Appeals. *People* v. *McCarthy*, 250 N. Y. 358, at 362.

Hence the application to Judge Fuld of the Court of Appeals, and his order made thereon (R. 97) exhausted

the permissive provisions of the Code of Criminal Procedure, just as the prior appeal to the Appellate Division, First Judicial Department, and the order made thereon (R. 83) had exhausted petitioner's appeal as a matter of right.

Thus no further appeal to the Courts of the State of New York is open to petitioner. In accordance with the Code of Criminal Procedure, the judgment of the appellate court must be entered in the judgment book "and a certified copy of the entry forthwith remitted to the clerk with whom the original judgment roll is filed * * *" (§547).

A further provision is that "The decision of the court and the return shall be remitted to the court below in the same form and manner as in civil actions" (§548). In the case at bar the remittitur of the Appellate Division, First Judicial Department, was remitted to the clerk of the Court of Special Sessions of the City of New York. The jurisdiction of the appellate court thereupon ceases and all orders which may be necessary to carry the judgment into effect must be made by the court to which the certificate is remitted (§549).

Thus the Appellate Division, First Judicial Department, is the highest Court of the State of New York in which a final decision could be had. The judgment of affirmance is entered in the judgment book of that Court and that closes all further right to appeal within the State.

Gorman v. *Washington University,* 316 U. S. 98, re-hearing denied 316 U. S. 711;

Adams v. *Saenger,* 303 U. S. 59, re-hearing denied 303 U. S. 666;

Minneapolis, St. Paul & S. S. M. Ry. Co. v. *Rock,* 279 U. S. 410;

Western Union Telegraph Co. v. *Priester,* 276 U. S. 252.

No question is raised concerning either the power of the Board of Health of the City of New York to enact a Sanitary Code, or respecting the validity of the ordinance itself. *People* v. *Blanchard*, 288 N. Y. 145, 147; *Polinsky* v. *People*, 73 N. Y. 65, 69-70; *People ex rel Lodes* v. *Department of Health of the City of New York*, 117 App. Div. 856, 871. Such an ordinance has the force and effect of a statute. *People ex rel Lodes* v. *Department of Health of the City of New York, supra*, at page 875.

The information here charged violation of Section 225 of the Sanitary Code of the City of New York (R. 4). That section merely recites that

> "It shall be the duty of every person who shall have contracted or undertaken * * * to heat, or to furnish heat for any building or portion thereof, occupied as a home or place of residence of one or more persons, * * * to heat, or to furnish heat for every occupied room in such building, or portion thereof, so that a minimum temperature of sixty-eight (68) degrees Fahrenheit may be maintained therein at all such times. Provided, however, that during the present war emergency, it shall not be deemed a violation of this section if a minimum temperature of sixty-five (65) degrees Fahrenheit is maintained at all such times."

The information charged the alleged violation to have occurred in March, 1944, while the war was still actively being prosecuted.

This same section further provides that such heat is to be furnished between the hours of 6 A. M. and 10 P. M., "whenever the outer or street temperature shall fall below fifty-five (55) degrees Fahrenheit."

No provision for enforcement or punishment for violation is contained within the section. However, the preceding section (§224, *infra*, page 12) provides that

> "Any violation of the Sanitary Code of the City of New York shall be punished in the manner prescribed by Sections 1740 and 1937 of the Penal Law of the State of New York, Section 558 of the New York City Charter, and Section 564-6.0 of the Administrative Code of the City of New York" (*infra*, page 12).

The relevant provisions here are Section 1740 of the Penal Law (*infra*, page 14), Section 558 of the New York City Charter (*infra*, page 13), and Section 564-6.0 of the Administrative Code of the City of New York (*infra*, page 14). Unless these provisions be invoked, neither enforcement, nor punishment for violation, is possible. The Board of Health of the City of New York can neither define a criminal offense nor prescribe punishment,—that is exclusively a legislative function that may not be delegated. *People* v. *Blanchard*, 288 N. Y. 145, at 148; Penal Law of the State of New York, Section 22.

Thus at bar it is the legislative enactments alone, that is, the provisions of the New York City Charter and of the Penal Law of the State of New York, that make a violation of the Sanitary Code a misdemeanor. True, that Code lays a legal duty upon petitioner, but even neglect of such a duty is not a crime unless made so by a statute. *People* v. *Watson*, 154 Misc. 667, 670, aff'd 245 App. Div. 838.

Indeed, the very form of the information itself (R. 4) discloses clearly that this was a prosecution by the State of New York, not of the City. Concededly, the State does not prosecute for violation of a municipal ordinance or of a regulation of a municipal Board of Health. The State moves pursuant to its own statutes.

Here no other course was possible, for the Sanitary Code regulation is absolutely lifeless, except as it is made viable by the State enactments, the City Charter (section 558), and the Penal Law (section 1740). So while the Sani-

tary Code provision plays its part, to wit, posits a factual criterion to be met, whether a misdemeanor has been committed depends upon the requirements of the statutes that provide for punishment. Neither the charter provision (section 558), nor that of the Penal Law (section 1740), may be construed as imposing liability absolute in the nature of *malum prohibitum*. A misdemeanor, from time immemorial, has required *mens rea*, and that is precisely of what petitioner was convicted (Charter of City of New York, section 558).

Nothing in the Penal Law of the State of New York alters that requirement (sections 2 and 22). And all doubt is removed by the precise wording of section 1740 of the Penal Law (*infra*, page 14).

At bar is not the familiar situation of *malum prohibitum*, in which a statute expressly, or by inevitable implication, makes the doing of an act *per se* a violation, or which contains a provision that the doing or non-doing of a certain act is *prima facie* a violation. *People* v. *Harrison*, 183 App. Div. 812 (a speed of fifteen miles per hour is *prima facie* evidence of a prohibited rate of speed); *People* v. *Swift & Co.*, 286 N. Y. 64 (mere possession of poultry constituted *prima facie* evidence that it was offered for sale for use as human food); *People* v. *Thompson and Potter, Inc.*, 289 N. Y. 259 (the Code provision specifically forbade possession of shell fish received from a non-registered source).

Thus the Sanitary Code provision is implemented by the Charter and Penal Law provisions adverted to above. The Charter provision is general and provides merely that a violation of the Sanitary Code is to be regarded as a misdemeanor. Nothing therein contained supports the conclusion that the mere failure to comply with the temperature requirements, completely rebutted as it is at bar by uncontradicted testimony that this failure was due to a circumstance beyond petitioner's control, is sufficient to sustain a conviction. This being a criminal prosecu-

tion, the statute upon which it is based may not be loosely enlarged, but must be strictly construed. *People* v. *Werner*, 174 N. Y. 132, at 134.

The provisions of the Administrative Code and the Penal Law, both of which are legislative enactments and pursuant to which alone enforcement and punishment may be had, specifically prescribe the element of wilfullness as an essential element of the violation. The Trial Court itself recognized this (R. 51).

Thus without resort to that section of the Penal Law of the State which alone specifically deals with this situation, petitioner could not have been lawfully convicted. Nevertheless, in the face of this specific injunction of the Legislature, petitioner was convicted, even though the evidence is unequivocal to the effect that no wilfulness whatsoever on petitioner's part had been established. (See *People* v. *Potter*, 112 N. Y. Supp. 298 [not officially reported].)

From the nature of this case, as disclosed hereinabove, it is evident that precise precedent to support petitioner's contention cannot be found. Particularly is that so in view of the fact that petitioner does not attack the validity of the statute under which he was convicted, nor does he assert that the procedure of his prosecution lacked any of the elements of due process.

Petitioner is almost, but not quite, in the position of asking this Court to review the decisions of the courts of the State of New York on a matter of local law. Established precedent denies that course to him. *American Railway Express Co.* v. *Commonwealth of Kentucky*, 273 U. S. 269; *Live Oak Water Users' Ass'n.* v. *Railroad Commission of State of California*, 269 U. S. 354; *Patterson* v. *Colorado*, 205 U. S. 454.

And well recognized is the principle that the meaning attributed by the highest court of a state to a statute of the state must be accepted by this Court. *Supreme Lodge, etc.* v. *Meyer*, 265 U. S. 30; *Des Moines National*

Bank v. *Fairweather*, 263 U. S. 103; *Smith* v. *Jennings*, 206 U. S. 276; *Burt* v. *Smith*, 203 U. S. 129; *United Gas Public Service Co.* v. *State of Texas*, 303 U. S. 123; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673.

Here what petitioner complains of is, that by imposing upon him an absolute liability, in a criminal prosecution, based upon statutes that specifically require that wilfulness must be shown, the courts of the State of New York have in effect judged petitioner into a result that contravenes his constitutional guarantee. As the record shows, he raised the point repeatedly below (R. 23, 27, 42, 74), but to no avail.

Virtually without exception, the books disclose decisions of this Court, when acting on an appeal to it under the Fourteenth Amendment, relating either to legislative acts, or to one or more procedural aspects of a judicial proceeding. Yet it would appear clear on principle that within the great perimeter of that basic guarantee may be found room for action by this Court to examine the substance of a judicial proceeding, despite its formal correctness in all procedural aspects, to insure to a national citizen his rights under it.

As this Court has stated,

> "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws". Civil Rights Cases, 109 U. S. 3, at p. 11.

Nor is there the slightest doubt that acts of substance of the state judiciary may be inquired into under the Amendment. The scope of inquiry is not limited merely to scrutiny of legislative or executive acts. Concerning that, this Court has said (referring to the words of the Fourteenth Amendment):

> "They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." *Ex parte Virginia,* 100 U. S. 339, at pp. 346-7.

The facts of record upon which petitioner relies, to-wit, the undisputed testimony that the failure to furnish heat of the required temperature was due solely to a breakdown of heating equipment, concerning which negligence was not even attributed to petitioner, let alone wilfulness, may be examined by this Court. *Hooven and Allison Co.* v. *Evatt,* 324 U. S. 652, rehearing denied 325 U. S. 892; *Akins* v. *State of Texas,* 325 U. S. 398.

The Federal right here asserted by petitioner depends upon an appraisal of these undisputed facts. And though

this Court, presumptively, will accept the conclusion of the trier on designated issues, that conclusion in the instant case is so lacking in support in the evidence that to give it effect effectively denies to petitioner the benefit of the constitutional guarantee here invoked. *Akins* v. *State of Texas, ubi supra.*

In short, this Court may search the record in a state court to make certain that no constitutional guarantee has been defeated. *Milk Wagon Drivers Union of Chicago, Local 753* v. *Meadowmoor Dairies,* 312 U. S. 287, rehearing denied, 312 U. S. 715.

This Court will grant certiorari to review a Federal question not theretofore determined by it. *Brooklyn Savings Bank* v. *O'Neil,* 324 U. S. 697, rehearing denied 325 U. S. 893.

As already indicated, search has failed to disclose a decision of this Court in which it has passed upon the substance of a determination by a state court where neither the validity of the state statute nor the propriety of state judicial procedure was in question. Nevertheless, petitioner, because of the erroneous result here reached, a result due to the failure of the courts below to pay heed to the express language of the pertinent statutes, is as harmed as though he had been convicted under an unconstitutional statute, or pursuant to procedure doing violence to basic tenets of propriety.

Perhaps the granting of a writ here does mean the fashioning of another facet on the multi-faced aspect of the Fourteenth Amendment, as that has been fashioned by this Court over the years. That hardly should be a deterrent. Particularly here, for the express wording of the statute of whose violation petitioner was adjudged guilty required *mens rea,* and the undisputed evidence is that not even the effort was made by the State to show that, to say nothing of the fact that it was not established.

August, 1946.

Sol. A. Herzog,
Attorney for Petitioner.

APPENDIX.

Sanitary Code of the City of New York (Pertinent Provisions).

§224. Punishment for violation of the Sanitary Code.

Any violation of the Sanitary Code of the City of New York shall be punished in the manner prescribed by Sections 1740 and 1937 of the Penal Law of the State of New York, Section 558 of the New York City Charter, and Section 564-6.0 of the Administrative Code of the City of New York. (Adopted May 21, 1918, and amended May 10, 1938 and October 7, 1941.)

§225. Heating of Occupied Buildings.

It shall be the duty of every person who shall have contracted or undertaken, or shall be bound, to heat, or to furnish heat for any building or portion thereof, occupied as a home or place of residence of one or more persons, or as a business establishment where one or more persons are employed, to heat, or to furnish heat for every occupied room in such building, or portion thereof, so that a minimum temperature of sixty-eight (68) degrees Fahrenheit may be maintained therein at all such times. Provided, however, that during the present war emergency, it shall not be deemed a violation of this section if a minimum temperature of sixty-five (65) degrees Fahrenheit is maintained at all such times. The provisions of this section shall not apply to buildings, or portions thereof, used and occupied for trades, businesses, or occupations where high or low temperatures are essential and unavoidable.

For the purpose of this section, wherever a building is heated by means of a furnace, boiler, or other apparatus under the control of the owner, agent, or lessee of such

building, such owner, agent, or lessee, in the absence of a contract or agreement to the contrary, shall be deemed to have contracted, undertaken, or bound himself or herself to furnish heat in accordance with the provisions of this section.

The term "at all such times" as used in this section, unless otherwise provided by a contract or agreement, shall include the time between the hours of 6 a. m. and 10 p. m. in a building, or portion thereof, occupied as a home or place of residence, of each day whenever the outer or street temperature shall fall below fifty-five (55) degrees Fahrenheit, and during the usual working hours established and maintained in a building, or portion thereof, occupied as a business establishment, of each day whenever the outer or street temperature shall fall below fifty (50) degrees Fahrenheit.

The term "contract" as used in this section shall be taken to mean and include a written or verbal contract. (As amended September 12, 1944.)

New Charter of the City of New York
(Effective Jan. 1, 1938).

§558. a. The sanitary code which is in force in the city on the date at which this charter takes effect and all existing provisions of law fixing penalties for violations of the code and all regulations of the board of health on file with the city clerk on the date when this charter takes effect shall continue to be binding and in force except as amended or repealed from time to time. Such code shall have the force and effect of law.

* * * * *

d. Any violation of the sanitary code shall be treated and punished as a misdemeanor. Pecuniary penalties for violations of the sanitary code may be recovered in a civil action before any justice or tribunal in the city having jurisdiction of civil actions.

Administrative Code of the City of New York (Chapter 929, Laws of 1937).

§564-6.0. Penalties. a. Every person, corporation, or body that may have wilfully done or omitted any act or thing which is by any law declared to be, or to subject the party guilty thereof to punishment for, a misdemeanor, shall in addition thereto, be subject to a penalty of two hundred fifty dollars, to be sued for and recovered by the department in any civil tribunal in the city.

b. Every person, corporation, or body, that shall violate or not conform to any provisions of the sanitary code, or any rule or sanitary regulation duly made, shall be liable to pay a penalty not exceeding fifty dollars nor less than twenty dollars for each offense, which may be sued for and recovered by and in the name of the department, with costs, before any justice or tribunal in the city having jurisdiction of similar actions. The judge or justice who presided at a trial where such penalty is claimed, on such trial, in writing, shall fix the amount of the penalty to be recovered, and shall direct such amount to be, and it shall be included in the judgment.

Penal Law of the State of New York (Pertinent Provisions).

§1740. Wilful violation of health laws.

1. A person who wilfully violates or refuses or omits to comply with any lawful order or regulation prescribed by any local board of health or local health officer, is guilty of a misdemeanor.

2. A person who wilfully violates any provisions of the health laws, or any regulation lawfully made or established by any public officer or board under authority of the health laws the punishment for violating which is not

otherwise prescribed by those laws, or by this chapter, is punished by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars or by both.

Fourteenth Amendment.

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court of the United States

No. 411—October Term, 1946

THE PEOPLE OF THE STATE OF NEW YORK on Complaint of MICHAEL FITZGERALD,

Respondent,

against

HAROLD HERMAN,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

September 5, 1946.

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SEYMOUR B. QUEL,
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THE PEOPLE OF THE STATE OF NEW YORK on Complaint of MICHAEL FITZGERALD,

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HAROLD HERMAN,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of Facts

The petitioner seeks to have this Court review by writ of certiorari an order of the Appellate Division of the Supreme Court of the State of New York, which unanimously affirmed a judgment of a Court of Special Sessions held by a City Magistrate of the City of New York, convicting the petitioner of a violation of § 225 of the Sanitary Code of the City of New York relating to the heating of occupied buildings (see Appendix, *post*, pp. 11-12) and sentencing him to payment of a fine of $150 with the alternative of imprisonment for 60 days. The fine was paid (R. 7). The proceedings in the Trial Court are unreported. The affirmance by the Appellate Division was without opinion and is reported in 270 N. Y. App. Div. 891.

An application to the Appellate Division for leave to appeal to the New York Court of Appeals was dismissed.

While the order of dismissal is printed in the record (R. 95-96), the memorandum decision of the Court is not. It is reported in 270 N. Y. App. Div. 1014 and reads as follows:

> "*The People of the State of New York* v. *Harold Herman.*—Motion for leave to appeal to the Court of Appeals dismissed. (See Code Crim. Pro., § 520; *People* v. *Geffin,* 245 N. Y. 75.) Present—MARTIN, P.J., DORE, COHN, CALLAHAN and PECK, JJ. [See *ante,* p. 891.]"

A subsequent application for leave to appeal was made to Judge STANLEY H. FULD of the New York Court of Appeals and was likewise dismissed. The order of dismissal is in the record (R. 97-98) and is unreported.

The petitioner is in error in his repeated statement (petition, pp. 2, 3, 4; brief, p. 1) that the applications for leave were denied. The fact is that they were dismissed and that the dismissals were due to the petitioner's failure to comply with the statutory requirements of the State of New York relative to appeals in criminal cases.

Outline of Argument

The petitioner has failed utterly to meet the prerequisites to a review by this Court of the final judgment or decree of a state Court, as laid down in § 237 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 937; U. S. Code of Laws, Tit. 28, § 344). We shall show that:

I. The Appellate Division of the Supreme Court is not the highest court of the State of New York in which a decision could be had of the criminal action. The failure of the defendant, petitioner here, to make timely application for leave to appeal to the Court

of Appeals bars a review by this Court of the order of the Appellate Division.

II. No federal question was either raised or passed upon by the Courts of the State of New York; hence, there is nothing for this Court to review. The defendant's guilt was in any event fully established by competent proof.

POINT I

The Appellate Division of the Supreme Court is not the highest court of the State of New York in which a decision could be had of the criminal action. The failure of the defendant, petitioner here, to make timely application for leave to appeal to the Court of Appeals bars a review by this Court of the order of the Appellate Division.

Authority for the review by certiorari by this Court of a judgment or decree of a State Court is found in § 237 of the Judicial Code (28 U. S. C. A., § 344) which, so far as here relevant, provides:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, * * * any cause wherein a final judgment or decree has been rendered or passed upon by the highest court of a State in which a decision could be had * * *."

The petitioner seeks a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York which had affirmed a judgment of a Court of Special Sessions convicting him of a misdemeanor. The statutory provisions of the State of New York governing appeals in

criminal cases are found in §§ 520 and 521 of the New York Code of Criminal Procedure which are set out in the Appendix, *post*, pp. 13-14. These sections were considered by the Court of Appeals of the State of New York in *People* v. *Geffin*, 245 N. Y. 75 (1927), where it was said (p. 76):

> "Under the amendments to section 520 made by the Laws of 1926, chapter 465, taking effect July 1, 1926, but one appeal is allowed in a criminal case as matter of right. An appeal must be taken within thirty days after the judgment is entered. A further appeal may be taken to the Court of Appeals where a judge of that court or a justice of the Appellate Division of the department in which such conviction was had certifies that a question of law is involved which ought to be reviewed by the Court of Appeals. The Legislature, however, has failed to prescribe any time within which the application for such a certificate shall be made.
>
> By section 521 an appeal must be taken within thirty days after the judgment was rendered or the order entered. The word 'order' evidently refers to the order of the Appellate Division. As the appeal must be taken within thirty days after the entry of such an order it necessarily follows that the application for the certificate permitting such an appeal must also be applied for within those thirty days."

In the instant case the order of affirmance of the Appellate Division was entered in the office of the Clerk of that Court on April 18, 1946, and a copy thereof with notice of entry was served on the then attorney for the defendant (petitioner here) on April 22, 1946 (cf. R. 90, 94). Under the applicable provisions of the New York Code of Criminal Procedure the time of the defendant to apply to a Judge of the Court of Appeals or a Justice of the Appellate Divi-

sion for leave to appeal to the Court of Appeals expired on May 18, 1946.

The defendant made no application within the statutory period. By notice of motion dated June 17, 1946, and served on June 19, 1946, he moved in the Appellate Division for leave to appeal. That motion was not only untimely but was further improper because it was made to the Court instead of an individual Justice thereof. See *People* v. *McCarthy*, 250 N. Y. 358, 361-362 (1929). The Appellate Division accordingly dismissed the motion for leave and referred in its memorandum decision (set forth *ante*, p. 2) to *People* v. *Geffin*, *supra* [245 N. Y. 75], which, as we have seen, held that an application for leave to appeal must be made within 30 days after entry of the judgment or order from which the appeal is sought.

Thereafter and on July 3, 1946, a verbal application for leave to appeal was made to Judge STANLEY H. FULD of the New York Court of Appeals. He dismissed the application and in his formal order inserted a statement "that the application to me is made more than 30 days after the entry of the order of the Appellate Division, First Department, affirming the judgment of conviction" (R. 98).

It thus plainly appears that the defendant made no move to procure leave to appeal to the Court of Appeals until after the time limited by statute for such application had expired. It cannot, therefore, be said that the Appellate Division was the highest court of the state in which a decision could be had. It may well be that had the defendant followed the proper practice he would have been granted leave to appeal and would have secured a determination on the merits by the Court of Appeals. It follows that the petitioner has not met the requirements of the Judicial Code and that his petition should be dismissed. It will suffice in this respect

to quote the words of Chief Justice WAITE in *Fisher* v *Perkins*, 122 U. S. 522 (1887), where he said (pp. 525-526):

> "This court has no power to review any other judgments of the courts of a state than those of the highest court 'in which a decision in the suit could be had.' § 709, Rev. Stat. The Court of Appeals is the highest court of the state of Kentucky, and, consequently, until it has been made to appear affirmatively on the face of the record that a decision in this suit could not have been had in that court, we are not authorized to review the judgment of the Superior Court. Although the value in controversy is less than $1000, and the judgment of the inferior court was affirmed by the Superior Court without a dissenting vote, an appeal did lie to the Court of Appeals if two of the judges of the Superior Court certified that, in their opinion, the question involved was novel and of sufficient importance.
>
> To get an appeal from the Superior Court in any case an application therefor must be made to and granted by that court. Such is the express provision of § 7 of the act under which the court was organized. Certainly it would not be claimed that a judgment of the Superior Court could be reviewed by this court in a case not within the exceptions mentioned in § 5 before an application had been made in proper time for the allowance of an appeal, and the application refused for some sufficient reason."

And see *John* v. *Paullin*, 231 U. S. 583 (1913); *Stratton* v. *Stratton*, 239 U. S. 55 (1915); *McMaster* v. *Gould*, 276 U. S. 284 (1927); *Gorman* v. *Washington Univ.*, 316 U. S. 98 (1941).

POINT II

No federal question was either raised or passed upon by the Courts of the State of New York; hence, there is nothing for this Court to review. The defendant's guilt was in any event fully established by competent proof.

The petition states (p. 3) that the "jurisdiction of this Court is invoked under Section 237(a) of the Judicial Code (28 U. S. C., § 344)." The cited subdivision provides for review by way of appeal. We assume that the petitioner intended to refer to subdivision (b) governing applications for writs of certiorari since that is the relief requested (petition, p. 9). In any event, it is clear that a review is sought of the decision of a state court and it is equally clear that, as stated by Chief Justice HUGHES in *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52 (1934), at pp. 54-55:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. [Citing cases] Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. [Citing cases]"

The record in the case at bar will be searched in vain for any suggestion that a federal question was presented

to the Courts of the State of New York, much less than a question of that nature was passed upon by them. More specifically, the defendant's motions to dismiss did not include a constitutional ground (R. 42, 74); no motion was made by him in arrest of judgment; and the belated notice of motion for leave to appeal addressed to the Appellate Division recited that the application was made (R. 85)

> "upon the ground that the conviction of defendant-appellant by the Court of Special Sessions of the City of New York was based upon an erroneous construction by the Trial Court of appropriate provisions of the Penal Law of the State of New York and of the Sanitary Code of the City of New York, which said construction of said statute and ordinance is at variance with the decisions of the Courts of this State, construing the same or similar statutes, and upon the ground that the evidence adduced at the trial does not establish the guilt of defendant-appellant beyond a reasonable doubt, as required by the Constitution and statutes of the State of New York, * * *."

It will be observed that the notice of motion did not so much as mention any article or provision of the Constitution, treaties, or laws of the United States. The construction, application and effect of the Constitution and statutes of the State of New York are, of course, matters of state concern and cannot be employed to invoke the limited jurisdiction of this Court. *Levy* v. *Superior Court of San Francisco*, 167 U. S. 175 (1897); *California National Bank* v. *Thomas*, 171 U. S. 441, 446 (1898); *Gibbes* v. *Zimmerman*, 290 U. S. 326, 328 (1933).

And apart from all the considerations already dealt with, we would add that even assuming, *arguendo*, that the petitioner is rightfully here, it is apparent that the sub-

stantive contention which he urged upon this Court is without merit. If we understand him correctly, his position is that error was committed by the state Courts when he was found to be guilty of the misdemeanor charge despite an alleged lack of any criminal intent or *mens rea*. But the Sanitary Code section involved does not make guilt dependent on wilfulness, malice or wrongful motive. It falls rather within the class of legislative enactments referred to by this Court in *United States* v. *Dotterweich*, 320 U. S. 277 (1943), where it was said (pp. 280-281):

> "The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. See *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, 57, and *McDermott* v. *Wisconsin*, 228 U. S. 115, 128. The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct-awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. *United States* v. *Balint*, 258 U. S. 250."

Moreover, provision is separately made by the applicable statutes for the punishment, on the one hand, of those guilty generally of a violation of the Sanitary Code and like enactments, and, on the other hand, of those specifically charged with a "Wilful violation of health laws" (cf. Sanitary Code, § 224; Penal Law, §§ 1740, 1937; see Appendix, *post*, pp. 12-13).

If we accept, too, for the moment, the petitioner's contention that "wilfulness or intent" is an essential element of the crime charged (petition, p. 8), it still does not avail him. As Mr. Justice HOLMES said in *Ellis* v. *United States*, 206 U. S. 246 (1906), at page 257:

> "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

And see *Horning* v. *District of Columbia*, 254 U. S. 135, 137 (1920); *Screws* v. *United States*, 325 U. S. 91, 96-97 (1944).

It remains only to note that counsel for the defendant conceded on the trial that a landlord who would undertake to convert the heating system of an apartment house from oil to coal, or *vice versa*, during the winter season without provision for maintaining the temperature of the dwelling at the minimum fixed by law, could properly be held to have violated the statute (R. 75-76).

CONCLUSION

The petition for certiorari should be dismissed for lack of jurisdiction or, in the alternative, should be denied for want of a federal question.

September 5, 1946.

Respectfully submitted,

JOHN J. BENNETT,
Corporation Counsel of the
City of New York,
Attorney for Respondent.

SEYMOUR B. QUEL,
FRED ISCOL,
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APPENDIX

Statutes Involved

Sanitary Code of City of New York

§ 225. Heating of occupied buildings.

It shall be the duty of every person who shall have contracted or undertaken, or shall be bound, to heat, or to furnish heat for any building or portion thereof, occupied as a home or place of residence of one or more persons, or as a business establishment where one or more persons are employed, to heat, or to furnish heat for every occupied room in such building, or portion thereof, so that a minimum temperature of sixty-eight (68) degrees Fahrenheit may be maintained therein at all such times. Provided, however, that during the period fuel oil is rationed by the Office of Price Administration because of the present war emergency, it shall not be deemed a violation of this section if a minimum temperature of sixty-five (65) degrees Fahrenheit is maintained at all such times in a building where oil is the fuel exclusively used for the heating of the building. The provisions of this section shall not apply to buildings, or portions thereof, used and occupied for trades, businesses, or occupations where high or low temperatures are essential and unavoidable.

For the purpose of this section, wherever a building is heated by means of a furnace, boiler, or other apparatus under the control of the owner, agent, or lessee of such building, such owner, agent, or lessee, in the absence of a contract or agreement to the contrary, shall be deemed to have contracted, undertaken, or bound himself or herself to furnish heat in accordance with the provisions of this section.

The term "at all such times" as used in this section, unless otherwise provided by a contract or agreement, shall include the time between the hours of 6 a. m. and

10 p. m. in a building, or portion thereof, occupied as a home or place of residence, of each day whenever the outer or street temperature shall fall below fifty-five (55) degrees Fahrenheit, and during the usual working hours established and maintained in a building, or portion thereof, occupied as a business establishment, of each day whenever the outer or street temperature shall fall below fifty (50) degrees Fahrenheit.

The term "contract" as used in this section shall be taken to mean and include a written or verbal contract.

§ 224. Punishment for violation of the Sanitary Code.

Any violation of the Sanitary Code of The City of New York shall be punished in the manner prescribed by Sections 1740 and 1937 of the Penal Law of the State of New York, Section 558 of the New York City Charter, and Section 564-6.0 of the Administrative Code of The City of New York.

N. Y. Penal Law

§ 1740. Wilful violation of health laws

1. A person who wilfully violates or refuses or omits to comply with any lawful order or regulation prescribed by any local board of health or local health officer, is guilty of a misdemeanor.

2. A person who wilfully violates any provision of the health laws, or any regulation lawfully made or established by any public officer or board under authority of the health laws the punishment for violating which is not otherwise prescribed by those laws, or by this chapter, is punished by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars or by both.

§ 1937. Punishment of misdemeanors when not fixed by statute

A person convicted of a crime declared to be a disdemeanor, for which no other punishment is specially

prescribed by this chapter, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both.

N. Y. Code of Criminal Procedure

§ 520. Appeal, a matter of right; one appeal; how taken

All appeals, provided for in this chapter may be taken as a matter of right. Every person convicted in a criminal action or proceeding shall have the right to have such judgment of conviction or order reviewed on appeal by an appellate tribunal as herein provided, but there shall be only one such appeal and the decision of the appellate court shall be final, and no appeal shall lie from that court to any other court except as hereinafter provided.

1. In the city of New York such appeals shall be taken as follows: From a conviction by a city magistrate to the appellate part of the court of special sessions; from a conviction by a court of special sessions to the appellate division of the supreme court of the department in which the conviction was had; from a conviction by the court of general sessions of the county of New York or by a county court within said city or from the supreme court except where the penalty is death, to the appellate division of the supreme court of the department in which the conviction was had; from a conviction by said court of general sessions or by said county courts or supreme court where the penalty is death, to the court of appeals.

* * * * * * *

3. Where an appeal has been taken and has been decided by any of the appellate tribunals hereinabove referred to, a further right of appeal to the court of appeals shall lie as hereinafter prescribed, but not other-

wise. If a judge of the court of appeals or a justice of the appellate division of the supreme court of the department in which such conviction was had certifies that a question of law is involved which ought to be reviewed by the court of appeals, then a further appeal on such question of law may be taken to the court of appeals.

4. The provisions of this section shall supersede all other provisions of this code, or of any other law, dealing with appeals in criminal actions and proceedings, in so far as they may be in conflict with the same.

§ 521. Appeal to be taken; when

An appeal must be taken within thirty days after the judgment was rendered or the order entered; * except that when a party takes an appeal to the court of appeals after obtaining a certificate pursuant to subdivision three of section five hundred twenty, such appeal shall be timely if the application for leave to appeal is made within such thirty days and if the notice of appeal is duly served and filed within fifteen days after the certificate is granted.*

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* Words between asterisks were added by L. 1946, c. 942, the purpose of which was to temper the harsh rule laid down in *People* v. *Geffin, supra* [245 N. Y. 75], that where an application for leave to appeal is duly made but is granted after expiration of the 30-day period, the appeal must be taken "forthwith". See Twelfth Annual Report of the Judicial Council of the State of New York (1946), at pp. 297-298. The amendment does not enlarge the time within which an application must be made and does not, therefore, affect the situation in the instant case.